IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

No. 236

INTERNATIONAL STEVEDORING COMPANY,
A CORPORATION, PETITIONER

against

R. HAVERTY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

PETITION FOR REHEARING

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TO THE SUPREME COURT OF THE UNITED STATES AND THE HONORABLE JUDGES THEREOF:

The petitioner respectfully applies to this Honorable Court for a rehearing in this cause. The opinion was filed on October 18, 1926, and is reprinted in the Appendix hereto.

We are not ordinarily disposed to file a petition for rehearing and to burden this already overburdened court with a recital of our private disappointments. Moreover, we are appreciative of the fact that such

petitions are, and of right ought to be, rarely granted. However, the opinion in this case has caused such nationwide consternation among the maritime bar, and has so completely unsettled all fixed notions of what the law is, and will bring such an increased flood of maritime litigation to this court to again define the lines which by this opinion are obliterated, that we feel it our duty, first, to this Court, and, second, to the members of the maritime bar of the United States, whose many telegrams of consternation lie before us, to state briefly the matters wherein we consider the opinion open to question, and what its consequences are and will be.

A brief statement of our reasons (each of which is more fully developed in the appended brief) now follows:

I.

The opinion of the Court, in seeking the intent of Congress, overlooks the contrary construction made by Congress itself.

The Merchant Marine Act amending the Seamen's Act of 1915 was passed in 1920 and relates to merchant seamen. In 1922 Congress, as the result of the decision in *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, sought for a second time to give stevedores and other maritime workers statutory protection by amending sections 24 and 256 of the Judicial Code by saving to "claimants for compensation for injuries to or death of persons *other than the master or members of the crew* of a vessel their rights and remedies under the Workmen's Compensation Act of any state." The master and the members of the crew

of a vessel were excluded, because already protected under the Merchant Marine Act of 1920. Says the report of the Senate Judiciary Committee on the amendment of June 10, 1922 (S. Rep. No. 94, 67th Congress, 1st Session, found in Serial Vol. No. 7918):

> "There is a clear distinction between the two classes, seamen and landsmen, who work in and about ships. * * * The special treatment which seamen have always had under the acts of Congress was recently emphasized by the provision of the Merchant Marine Act of 1920 extending to seamen, *but not to other maritime workers*, the same rights of recovery in the case of work accidents now enjoyed by interstate railway employees * * * longshoremen, and ship repair men are land workers, subject neither to the peculiar conditions nor to the laws which regulate seamen. * * * *The peculiar maritime law applying to seamen is inapplicable to their conditions and no attempt has been made to apply it to them.*"

And the report of the House Judiciary Committee on the same law (H. Rep. No. 639, 67th Congress, second session, found in Serial Vol. No. 7955) says:

> "*Congress has always in legislating distinguished between these port workers and seamen.* It has assumed full control over the relation of master and servant at sea. Federal legislation determines the character of the quarters in which the crew is to be housed, the food to be served them, hours of labor, reciprocal duties of seamen and officer. * * * His right to recover damages

> was strictly limited by the law of the sea, *but Congress in the Merchant Shipping Act of 1920 gave him a wide right to recover damages, putting him on a basis with the employees in interstate commerce.* Congress has hitherto left to state control the relation of master and servant in longshore work or in ship repair."

These reports, written in 1921 and 1922, show that Congress has always understood the word "seamen" in its ordinary sense and has at no time had the faintest intention of including stevedores within the word "seamen", but, conscious of the fundamental differences in their situation, it has legislated differently with respect to each of them. The very act which Congress passed to protect stevedores and other maritime workers, expressly excluding "the master and the members of the crew of a vessel," was held invalid by this Court in *Washington v. W. C. Dawson & Co.*, 264 U. S. 219. The reason, therefore, that stevedores are unprotected by statute today (or were, until the present decision) is that the very act which Congress designed to protect them was held invalid by this court, and that the gap in statutory protection which has by all Courts and by all maritime lawyers and by Congress itself been considered to exist as to stevedores and other maritime workers not seamen, was created by this Court itself. That this has been a uniform construction of Congress is borne out further by the two acts introduced in the last session (69th Congress, First Session) being H. R. 12063 and S. 3170, each entitled "Longshoremen's and Harbor Workers Compensation Act," and the

reports of the judiciary committees of both houses (H. Rep. No. 1190, 69th Congress, first session; S. Rep. No. 936, 69th Congress, first session) show that Congress has been persistently trying to fill a gap in the statute law (of the existence of which it was for the third time by this court expressly advised in the Dawson decision) and has constantly construed the Merchant Marine Act of 1920 differently from this Court and has always accepted the word "seamen" in its well understood and usual sense. Thus the opinion of the court in this case is squarely contrary to the uniform expressed intent and construction of Congress itself. The gap which Congress has twice tried to fill without success has now been filled by the court itself.

II.

The opinion of the court overlooks the fact that the seamen's act of 1915 was interpreted by the Circuit Court of Appeals in *The Hoquiam*, 253 Fed. 627 (October 28, 1918) not to include stevedores, and that Congress in the Act of 1920 accepted that definition by amending the act without changing the judicial interpretation theretofore placed upon the statute. Hence according to the ordinary rule of statutory construction, often applied by this court, the amended act of 1920 must be construed in the light of the construction originally placed upon it, namely: that the term "merchant seamen" does not include "stevedores."

III.

The decision in this case strikes the word "election" from Section 33 of the Merchant Marine Act, at least as to stevedores, and thereby defeats the intent of Con-

gress. In *Panama R. R. Co. v. Johnson*, 264 U. S. 375, Section 33 was held valid solely because it gave a seaman the "election" between two systems of maritime law, *i. e.*, either an election under the old rules granting him compulsory compensation, regardless of negligence, in the form of wages to the end of the voyage and maintenance and cure, or an election to proceed under the new rules imported into the admiralty law by the incorporation of the principles of the Federal Employers' Liability Act. That was the sole basis on which the statute was sustained. The Court said: "Rightly understood, the statute * * * extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules, or that provided by the new rules. The election is between alternatives accorded by the maritime law." A stevedore has never had an "election" to proceed according to the "old rules" relating to a "seaman" and granting him "wages to the end of the voyage and maintenance and cure," and, therefore, a stevedore has no "election" of substantive maritime theories of recovery under Section 33 of the Merchant Marine Act. Thus the construction of the court in this case, at least as to stevedores, strikes the word "election" from the statute. Manifestly, when Congress used the word "election" in Section 33, Congress intended to cover only persons who would have an "election" to proceed either under the old rules or the new rules of the maritime law, and not persons who had no such "election" whatsoever, such as stevedores, boiler makers, dry dock workers, repair men, watchmen, painters, plumbers, and carpenters.

IV.

The construction placed upon the word "seamen" by the opinion of the court results in ascribing to Congress an intent to discriminate which it cannot be presumed Congress ever had, and which is contrary to its settled practice.

The opinion rests upon the ground that the work of stevedores was in early time done by seamen and that the Court "cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship."

What then of the repair men, boiler workers, dry dock workers, upholsterers, painters, and carpenters, who are also maritime workers, when working on navigable waters, but are clearly not seamen? Can it be assumed that Congress "willingly" included within the word "seamen" one class of workers who are not strictly seamen (such as stevedores), and "willingly" excluded other maritime workers who are not strictly "seamen" (such as the boiler makers, repair men, and the like)? The very fact that the construction adopted by the Court in this opinion would ascribe to Congress an intent to protect one class of maritime workers not strictly seamen, but to exclude another class of maritime workers not strictly seamen, shows that the construction is in itself a questionable one. If Congress intended to include more in the word "seamen" than just merchant seamen in the ordinary sense, then this Court must go the full distance and hold all maritime work-

ers to be within the protection of the "Seamen's" Act even though they perform maritime duties which seamen never perform. The Congressional legislation shows that with respect to maritime workers other than seamen, Congress has always included all in the same legislation; and, therefore, to ascribe to Congress an intent to protect one class of maritime workers not strictly seamen, but to exclude another class of workmen not strictly seamen, is to ascribe to Congress an intention that Congress never had, and one that is contrary to its uniform practice with relation to the particular subject matter.

V.

The opinion of the Court overlooks the consequences of the decision announced, in that it brings death actions of the stevedores under the Merchant Marine Act of 1920, contrary to the received opinion on that subject. The result of the decision is that all death actions of stevedores, repair men, and other maritime workers not seamen, which have heretofore been brought under state death statutes supplementing the maritime law under the rule of *Western Fuel Co. v. Garcia*, 257 U. S. 233, have been erroneously brought. If the present opinion is correct, the supplement to the maritime law in the form of state death statutes was superseded by the supervening uniform act of Congress in Section 33 of the Merchant Marine Act of 1920 (it has this effect as to seamen—*Engel v. Dvenport*, U. S. Adv. Ops. 1925-26, p. 424). The result is that judgments in all such actions thus brought, are erroneous and without jurisdiction, and

that in many cases the statute of limitations prevents a new action being commenced under the Act of 1920.

VI.

The opinion in the present case overlooks other consequences. If the decision in this case is correct, bringing personal injury and death actions of stevedores, and presumably of other maritime workers, under the Merchant Marine Act of 1920, then Congress, having exercised its power, and having thus eliminated state laws from the field, exclusively occupies the field. This result requires an overruling of the decisions of *Miller Indemnity Underwriters v. Braud*, U. S. Adv. Ops. 1925-6, p. 211; *Grant-Smith Porter Ship Co. v. Rohde*, 257 U. S. 469, which are all predicated on state statutes supplementing the admiralty law in the absence of a supervening uniform act of Congress. If the decision in the present case is correct, then the many admiralty cases that have been decided in recent years on the theory of state statutes permissibly supplementing the admiralty law in the absence of a supervening uniform act of Congress, have been erroneously decided because the fact has been completely overlooked that Congress has occupied the field.

VII.

The opinion of the Court overlooks the language and effect of the decision in *Washington v. Dawson & Co.*, 264 U. S. 219, a stevedoring case, where the court said: "This power [of Congress], we think would permit the enactment of a general employers' liability law, or general provisions for compensating injured employees." (It has already been pointed

out that Congress has undertaken to act upon this invitation) The *Dawson* case was argued on January 8, 1924, one month after *Panama RR. Co. v. Johnson* was argued, which was argued December 7, 1923. Since the court at the time of deciding the *Dawson* case had before it for consideration the Merchant Marine Act of 1920 relating to "seamen," the statement in the *Dawson* case that the Constitution gave Congress power which "*would permit* the enactment of a general employers' liability law" for stevedores indicates that this court did not at the time of the *Dawson* decision entertain the view that "stevedores" were included in the Merchant Marine Act of 1920 relating to "seamen." This must necessarily be true, because, if the provisions of the Seamen's Act applied to stevedores, there was already a "general employers' liability law" in the field, and the decision in the *Dawson* case should have turned on how far Congress could let state laws apply in a field *already* exclusively occupied by Congress with a "general employers' liability act."

VIII.

The opinion of the Court overlooks that Congress in the Merchant Marine Act of 1920 expressly mentions both stevedores and seamen. In Section 30 of the Act of 1920 the lien of "stevedores" is twice mentioned in express terms. Since Congress, therefore, in the same act expressly used both the term "stevedores" and the term "seamen," it is violating an elementary rule of construction to say that whenever Congress used the word "seamen" it intended to include "stevedores."

IX.

The opinion of the Court overlooks the ordinary rule of construction that words and phrases in a statute must be construed with regard to the statute as a whole so as to make a harmonious and uniform result. The construction given by the court to the word "seamen" in this opinion cannot in the nature of things be applicable to the word "seamen" wherever used elsewhere in the Seamen's Act, which relates to "seamen's" wages, hours of labor, food, flogging, and the like. Since the word "seamen" as used in the other sections of the Merchant Marine Act of 1920 cannot possibly be construed to include stevedores, that same meaning must be given to the word "seamen" in Section 33 because Congress is presumed to have intended a harmonious interpretation of the whole act.

X.

The opinion of the Court overlooks the rule of construction that words must be given their ordinary meaning. Congress is presumed to have intended to use language in its ordinary meaning unless it would manifestly defeat the object of its provisions. *Minor v. Mechanics Bank*, 1 Pet. 46. A statute should be read according to the nature and obvious import of its language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operations; and when the language is plain, words or phrases should not be inserted so as to incorporate in the statute a new and distinct provision. *U. S. v. Temple*, 105 U. S. 97, and see application of this same rule to the Seamen's Act in *O'Hare*

v. Luckenbach S. S. Co., U. S. Adv. Ops. 1925-6, p. 160, where the Court said:

> "In this conclusion we are fortified by the consideration that the legislation deals with seamen and the merchant marine and, consequently the phrase * * * is to be given the meaning which it had acquired in the language and usages of the trade to which it relates."

The opinion of the Court in the case avowedly stretches the meaning of the word "seamen" without regard to the context in which it is used and without regard to its ordinary and received meaning.

XI.

The opinion of the Court overlooks, without discussion, the uniform contrary decisions of the lower courts, where the question was considered with much deliberation.

Cassil v. U. S. Emergency Fleet Corp. (C. C. A.), 289 Fed. 774;

The Hoquiam (C. C. A.), 253 Fed. 627;

Young v. Clyde Steamship Co. (D. C.), 294 Fed. 549;

Grimberg v. Admiral Oriental Line, 300 Fed. 619;

Johnson v. American-Hawaiian Steamship Co., 14 Fed. (2d) 534;

The Steel Age, 1923 A. M. C. 348;

Carstensen v. Hammond Lumber Co., 11 Fed. (2d) 142;

Martis v. Union Transfer Co., 202 N. Y. Supp. 56 (App. Div).

XII.

The opinion of the Court is rested upon a ground that came up during the oral argument and was not argued in the written brief of the respondent. The respondent in his brief of forty-five pages pays but scant attention to the Merchant Marine Act of 1920, to-wit, two pages (Respondent's Brief, pp. 42-43). He had been defeated below on this point, recognized the uniform current of decision against him, and had little faith in the point, being himself of the opinion, voiced at the trial, that "a stevedore is not a seaman." (R. 150) As a matter of fact, the respondent argued not that the Jones Act covered the case of stevedores, but that since Congress abolished the fellow servant rule as to railroad employees and since the Jones Act abolishes the fellow servant rule as to "seamen" by importing the provisions of the Federal Employers' Liability Act, the public policy of the law has been so changed as to require this Court even in the absence of a statute, to wipe out the fellow servant doctrine in the case of maritime employees who are not "seamen," to-wit, stevedores, that being the only remaining narrow field for the operation of the rule.

A decision of such momentous consequences as the decision in this case, based as it is upon a theory largely developed by members of the court during the course of the oral argument, and overlooking a long line of uniformly contrary decisions of the lower Federal courts, as well as the expressed intent of Congress, ought of right be heard again in order that the precise ground of the decision may be fully recon-

sidered in all its aspects and in all its consequences, and in the light of rules of construction that have been settled for many decades. The opinion of the Court as now written has thrown new confusion into a field whose limits are now none too well defined, and has again opened the flood gates of litigation to determine the innumerable problems which now arise as the result of the interpretation laid down by the Court in this decision. For example, will longshoremen and their employers be invested with all the duties and obligations now incident to the relation of ship owner and seamen. Will other maritime workers besides longshoremen, such as boiler markers, repairmen, dry-dock workers, painters, plumbers, upholsterers and carpenters be included within the scope of the word "seamen" and have their rights determined under the Jones Act?

If error has been committed, the time to correct it is now, before the decision in this case becomes final. If the question is re-examined now, much expensive future litigation may be avoided. If not, uncertainty and chaos will prevail until by a long process of adjudication this Court has again defined the lines which are now all but obliterated. In the meantime, the burden of expensive litigation placed upon shipowners, maritime employers, and workmen, by virtue of the uncertainty of the law, will be almost disastrous.

For the foregoing reasons your petitioner prays this Honorable Court that a rehearing may be granted in the above entitled cause in order that the doctrine laid down in the opinion may be re-examined in the light of the expressed intent of Conogress, the settled

rules of construction, and the necessary consequences in the decision.

Dated the eighteenth day of November, 1926.

THE INTERNATIONAL STEVEDORING CO.,
a Corporation.

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CERTIFICATE OF COUNSEL

I hereby certify that I have examined the foregoing petition for rehearing and that in my opinion the petition is well founded, and that the petition is presented in good faith and not for delay.

STEPHEN V. CAREY,
Counsel for Petitioner